ment should be abrogated, it would be wrong in their Lordship's opinion to regard it as a wholly voluntary payment. The company was under a legal obligation to give the respondent three months' notice: it was under a moral obligation to treat him fairly, if not generously, after 11 years' employment. In fact it paid him the equivalent of 11 months' salary, it paid his passage home and he made no claim in respect of the failure to give him three months' notice.

Although there was no express bargain between the company and the respondent, their Lordships do not see any valid reason in principle for making a distinction between this case and cases (admittedly involving no charge to tax) where the payment is made expressly as consideration for abrogating a service agreement. Equally with such cases the payment falls outside the taxing words "in respect of his employment".

In their Lordships' opinion, therefore, the respondent succeeds in showing that the payment is not within the taxing provision.

It was held by the Federal Court that the payment was exempted as a retiring gratuity under section 13(1)(i). Their Lordships see the force of this. They would agree that the words "retiring gratuity" should not be narrowly interpreted, so as to include only cases of voluntary retirement. They would also agree that the fact that the respondent sought and obtained other employment in Trinidad does not prevent him from claiming that he retired from his previous employment. But the expression "retiring gratuity" has not, it appears, been judicially considered apart from the present case; and since it is not necessary for the decision upon this appeal, their Lordships consider it preferable not to express a final opinion upon it.

Their Lordships will advise the Head of Malaysia that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Stephenson, Harwood & Tatham; Slaughter & May.*

SINGAPORE REPORTS

MIMI WONG & ANOR. v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin C.J., Chua and Kulasekaram JJ.)
July 22, 1972]
[Singapore — Criminal Appeal No. 22 of 1970]

Penal Code, ss. 34 and 300(c), Exception 7 — Murder — Common intention — Diminished responsibility.

Criminal Law and Procedure — Misdirection of law by trial court — Powers of Court of Criminal Appeal — Supreme Court of Judicature Act (Cap. 15, 1970 Ed.) — Proviso to section 54 — When applicable.

This was an appeal by the two accused against their conviction for murder under section 302 read with section 34 of the Penal Code.

A Japanese named Watanabe came to Singapore in January 1966. In October 1966 he met Mimi Wong, the first appellant, who was then working as a waitress, and started dating her. About eight months after they first met they became intimate and a few months later they lived together at her home. On December 23, 1969 Mrs. Watanabe arrived in Singapore from Japan with her three children to join her husband. On January 6, 1970, two weeks after her arrival, Mrs. Watanabe was killed at No. 55 Jalan Sea View where she lived with her husband and children. The killing took place in the evening around 9.30 p.m. when her husband was not at home. She was stabbed twice in the neck and once in the abdomen and she had three other knife injuries on the right hand. One of the two neck wounds cut the external jugular vein and the abdominal wound cut the aorta and nicked the lumbar vertebra. She died as a result of shock and haemorrhage from these two stab wounds, death occurring within ten minutes.

The first appellant and her husband, the second appellant, from whom she had been separated for some years, were charged before a court of two judges of the High Court with the murder of Mrs. Watanabe in contravention of section 302 read with section 34 of the Penal Code. The trial judges found that it was the first appellant who inflicted the fatal injuries on the deceased; that she inflicted them deliberately, not accidentally, with great force, on vital parts of the body; that the fatal injuries were inflicted in furtherance of the common intention on the part of the two appellants, either to cause the death of the deceased or to inflict bodily injury on the deceased with a knife and that as the injuries actually inflicted were sufficient in the ordinary course of nature to cause death, both appellants were guilty of murder. The appellants were accordingly convicted and sentenced to death.

On appeal, several arguments were raised on behalf of both appellants to the effect that the trial judges had misdirected themselves on the meaning of the third limb of section 300 and of section 34 of the Penal Code. One argument was that a person cannot be found guilty of murder by the application of the third limb of section 300 unless it is proved that the fatal injury found to be present was the injury intended to be inflicted and as the trial judges merely found, by inference, that the first appellant inflicted the fatal injuries with the intention of causing bodily injury to the deceased with a knife the offence committed by the first appellant could not amount to the offence of murder as defined in section 300 of the Penal Code. Another argument advanced was that section 34 of the Penal Code can only be applied where the common intention of the persons accused of an offence was to commit the offence with which they are charged. It was argued that the second appellant could not be guilty of the offence of murder unless the common intention of the appellants was to cause the death of Mrs. Watanabe or such other intention as is mentioned in section 300 of the Penal Code. For the first appellant it was argued that the trial judges were wrong in holding that at the time of the commission of the offence the first appellant was not suffering from any abnormality of the mind and in holding that even if she were so suffering it had not caused impairment of her brain function so as to have substantially impaired her mental responsibility for her acts in causing the death of Mrs. Watanabe.

Held, dismissing the appeals: (1) a person cannot be found guilty of murder by the application of the third limb of section 300 of the Penal Code, unless it is proved that the fatal injury found to be present was the injury intended to be inflicted. *Virsa Singh* v. *State of Punjab*,[1] approved and followed;

(2) in the present case although there had been a misdirection of law in that the trial judges in giving their reasons for convicting the first appellant of murder under the third limb of section 300 of the Penal Code disclosed that they had failed to draw the irresistible inference that the first appellant had the intention required under the third limb, the other proved facts undoubtedly supported the conviction and under the circumstances the proviso to section 54 of the Supreme Court of Judicature Act would be applied as against the first appellant;

(3) in a criminal prosecution where section 34 of the Penal Code is invoked and the nature of the offence depends on a particular intention, the intention of the actual doer of the criminal act has to be considered. What this intention is will decide the offence committed by him and then section 34 applies to make the others vicariously or collectively liable for the same offence. The intention that is an ingredient of the offence constituted by the criminal act is the intention of the actual doer and must be distinguished from the common intention of the doer and his confederates. It may be identical with the common intention or it may not. Where it is not identical with the common intention, it must nevertheless be consistent with the carrying out of the common intention, otherwise the criminal act done by the actual doer would not be in furtherance of the common intention.

On the facts of the present case, section 34 of the Penal Code had been properly applied with regard to the charge against the second appellant. *Barendra Kumar Ghosh* v. *Emperor*[3] and *Mahboob Shah* v. *Emperor*[2] considered and applied.

(4) there was ample evidence to support the trial judges' finding that on the whole of the evidence, they were not satisfied on the balance of probabilities, that at the time of the commission of the offence the first appellant was suffering from any abnormality of the mind.

Per Curiam: In the light of our own system we are of the opinion that on the true construction of the proviso (to section 54 of the Supreme Court of Judicature Act) this court, if it is satisfied on the facts as found by the trial court and if it is also satisfied on those proved facts that the other irresistible inferences of fact ought to be drawn which, if drawn, would support the verdict of guilty arrived at by the trial court, ought to give full effect to the proviso.

Cases referred to:-

(1) *Virsa Singh* v. *State of Punjab*, [1958] C.L.J. 818; A.I.R. 1958 S.C. 465.

(2) *Mahboob Shah* v. *Emperor*, A.I.R. 1945 P.C. 118.

(3) *Barendra Kumar Ghosh* v. *Emperor*, A.I.R. 1925 P.C. 1.

COURT OF CRIMINAL APPEAL.

Dato' David Marshall for the first appellant.

John Tan Chor Yong for the second appellant.

Chia Quee Khee and *Ram Goswami* (Deputy Public Prosecutors) for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J.: On 23rd December 1969 Mrs. Watanabe, a Japanese woman, arrived in Singapore with her three children, the eldest an eight year old daughter Chieko Watanabe, to join her husband, Mr. Hiroshi Watanabe, a mechanical engineer, employed by a Japanese corporation undertaking reclamation work along the eastern seafront. Mr. Watanabe had come to Singapore alone in January 1966. In October 1966 he met Mimi Wong, the first appellant, who was then working as a waitress, and started dating her. About eight months after they first met they became intimate and a few months later they lived together at her home.

On 6th January 1970, two weeks after her arrival, Mrs. Watanabe was killed at No. 55 Jalan Sea View where she was living with her husband and children. The killing took place in the evening around 9.30 p.m. when her husband was away from home doing late work. She was stabbed twice in the neck and once in the abdomen and she had three other knife injuries in the right hand. One of the two neck wounds cut the external jugular vein and the abdominal wound cut the aorta and nicked the lumbar vertebra. She died as a result of shock and haemorrhage from these two stab wounds, death occurring within ten minutes.

At the time of the killing the first appellant and her husband, Sim Woh Kum, the second appellant, who had lived apart from her since 1963, were in Mrs. Watanabe's home. Her husband returning home at about 10.30 p.m. found her dead lying in a pool of blood on the floor of the bathroom on the first floor of the premises and his three children huddled together crying outside the bathroom door. He asked his eldest child, Chieko, who was responsible and she told him it was the first appellant and a man.

The appellants were charged and convicted by the High Court of the murder of Mrs. Watanabe after a trial lasting over four weeks. They now appeal against their convictions.

The main prosecution witness was Chieko. During the fortnight she was in Singapore before her mother's death she had been with the first appellant on several occasions. Her evidence was believed and accepted by the trial judges. She said that she was in bed, but not asleep that evening when she heard footsteps coming upstairs and heard voices, one a man's voice, in the corridor outside her bedroom. Then the first appellant entered her bedroom, walked round the room and then walked out. After that she heard voices coming from the adjacent bathroom and then she heard her mother scream in pain. She got out of bed and went to the bathroom. She saw her mother sitting on the bathroom floor just in front of the toilet bowl. A man, whom she subsequently identified as the second appellant at an identification parade, was pulling her mother's left hand and the first appellant was holding her mother's right hand. She cried when she saw blood on her mother's chest but when the first appellant covered her mouth with her hand she stopped crying whereupon the first appellant released her. She then went back to her bedroom and tried but failed to awaken her brother. She then returned to the bathroom and saw the appellants rushing down the stairs. She saw her mother standing in the bathroom, staggering a few steps and falling down. She cried "mother, mother" but there was no response. Subsequently she managed to wake her brother and sister and all three of them stood outside the bathroom crying until their father on his return home found them there.

The next day, 7th January 1970, at an identification parade the second appellant was identified by Chieko as the man she saw struggling with her mother in the bathroom on the night of 6th January 1970. The

second appellant was then arrested and charged with the murder of Mrs. Watanabe. Later that same evening the first appellant was arrested and also charged with the murder of Mrs. Watanabe. After the charge had been read out to her and the usual caution given to her she made a statement to Inspector Tan Kim Hai which was recorded by him and which recorded statement she signed.

Her statement was admitted in evidence at the trial and in it she said she went with a man to Mrs. Watanabe's house in a taxi and went upstairs where she did the stabbing.

On 8th January 1970 the second appellant made a statement before a magistrate and this statement was also admitted in evidence at the trial. In his statement he said that he met the first appellant, at her request, on 2nd January when she asked him to assist her in killing "a certain person" and she would give him money in return for his assistance. He said that he advised her against doing this and told her he was not greedy for money. On 6th January at about 9 p.m. the first appellant brought his youngest son to his house and at her request he accompanied her to her place of work and eventually to Mrs. Watanabe's house. Mrs. Watanabe let them in and the first appellant told Mrs. Watanabe that he was a plumber who had come to repair the broken wash basin. He said that after the first appellant had taken out a knife from her handbag, he threw some toilet cleansing liquid which was in a Glucolin tin on to the eyes of Mrs. Watanabe who was then stabbed by the first appellant. Later they ran out of the house, boarded a passing taxi to the house of a friend where the first appellant stayed for the night whilst he returned to his home.

Going back to the evening of 6th January 1970, Mr. Watanabe after finding his wife was dead went to the Joo Chiat Police Station with his three children and reported the fact of his wife's death. Inspector Tan Kim Hai went to Mr. Watanabe's home and in the bathroom saw the deceased lying face upwards dead and a knife lying between her thighs. He also saw an empty Glucolin tin on the bathroom floor and noticed the wash basin was broken.

In January 1970 the first appellant was living at No. 135A Rose Garden and employed a female house servant, Tan Sin Tse, who besides doing the cooking also looked after the first appellant's daughter. Tan Sin Tse said that on the evening of 6th January 1970 the first appellant and Mr. Watanabe, after he had dinner there, left the house together. Shortly after 10 p.m. the first appellant returned home and again left the house taking her daughter with her. Tan Sin Tse carried a leather bag and put it in a taxi into which the first appellant entered with her daughter. Tan Sin Tse saw a man seated at the rear seat of the taxi.

The appellants went in the taxi to the house of Lee Cheng Swee a friend of the second appellant where she and her daughter stayed the night and left the following morning sometime between 8 a.m. and 9 a.m. Later that afternoon she went to her stepmother's house and confessed to having stabbed a Japanese woman with a small knife while she was intoxicated. Her stepmother then took her to the home of her natural mother.

At the trial the first appellant retracted her confession to her stepmother and her statement to the police that she stabbed the Japanese woman. She testified that she was angry with the deceased and slapped her and a fight ensued in the bathroom. While they were fighting she said the second appellant threw some liquid from a Glucolin tin at the deceased causing the deceased to scream. During the fighting the deceased bit her on her right ring finger and she pushed the deceased who fell backwards hitting her head against a wall. She fell on top of the deceased but managed to free herself and ran downstairs and out of the deceased's house while the second appellant was still upstairs. She stopped a passing taxi and got into it and then the second appellant also got into the taxi and they proceeded to her house from where after fetching her daughter they proceeded to the house of a friend of the second appellant.

At the trial the second appellant also retracted his statement to the magistrate that he had been asked by the first appellant to assist in killing a person with a promise of money for his assistance as well as his statement that after she took out a knife and a pair of gloves he threw the contents of a Glucolin tin which was half filled with toilet cleansing liquid on to the eyes of the deceased who fell down and was then stabbed by the first appellant. His testimony at the trial was that he was taken to the deceased's house to have a look at a broken wash basin in a bathroom; that while he waited outside the first appellant and the deceased entered the bathroom to tidy it up; that a little later he heard a commotion coming from the bathroom and a scream; that he rushed into the bathroom and saw the first appellant stabbing the deceased with a knife in the region of the neck; that he separated them and pushed the first appellant out of the bathroom and in so doing was bitten on the right index finger by the deceased who fell down sitting on the bathroom floor; that the first appellant rushed back into the bathroom but he prevented her from further assaulting the deceased by pushing her away from the deceased who was seated on the floor of the bathroom and that thereafter the first appellant ran away. He himself got frightened on seeing blood on the deceased's chest and followed the first appellant downstairs and out of the house. They boarded a passing taxi which took them to the first appellant's house and subsequently to the house of his friend, Lee Cheng Swee, where he arranged for her to stay the night.

The trial judges rejected the evidence of the second appellant. They found that the idea of throwing the detergent came from him; that he brought the Glucolin tin containing the detergent; that he requested the first appellant to lure the deceased to the bathroom on the pretext of inspecting the broken wash basin; that he mixed water with the detergent; that he wrapped a towel round the Glucolin tin to prevent his leaving finger prints on it; that he threw the detergent into the eyes of the deceased after he saw the first appellant had taken a knife and was ready to stab the deceased and that he was clearly a party to the stabbing of the deceased.

On the facts we have outlined the trial judges found that it was the first appellant who inflicted the fatal injuries and that she inflicted them deliberately, not accidentally, with great force on vital parts of the body. They also said that it was a fair inference that the fatal injuries were inflicted either with the intention of causing the death of the deceased or with the intention of causing bodily injury to the deceased and came to the conclusion that "as the injuries actually inflicted were sufficient in the ordinary course of nature to cause death" the person who inflicted those injuries would be guilty of murder. They also found that the appellants had either of two common intentions namely (a) a common intention to cause deceased's death, or (b) a common intention to inflict bodily injury on the deceased with a knife and that in furtherance of "that common intention the first appellant inflicted with a knife serious injuries on the deceased which resulted in her death".

Several arguments have been raised on behalf of both appellants to the effect that the trial judges have misdirected themselves on the meaning of the third limb of section 300 and of section 34 of the Penal Code.

One argument is that a person cannot be found guilty of murder by the application of the third limb of section 300 unless it is proved that the fatal injury found to be present was the injury intended to be inflicted and as the trial judges merely found, by inference, that the first appellant inflicted the fatal injuries with the intention of causing bodily injury to the deceased with a knife the offence committed by the first appellant could not amount to the offence of murder as defined in section 300.

We are in no doubt that the law as regards the third limb of section 300 is as so argued and we are in full agreement with the Supreme Court of India in *Virsa Singh* v. *State of Punjab*[1] where the correct legal position as regards the third limb of section 300 of the Indian Penal Code (which is in identical terms with our section 300) has been set out in the judgment of Bose J.

Although we agree that there has been a misdirection of law on the part of the trial judges we have to consider the deputy public prosecutor's submission to us to apply the proviso contained in section 54 of the Supreme Court of Judicature Act which provides that this court —

"may, notwithstanding that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred."

He relies on the trial judges' findings that the fatal injuries were knife injuries deliberately, not accidentally, inflicted by the first appellant with great force on vital parts of the deceased's body. He submits that on the whole of the evidence and where the first appellant's defence at the trial that she did not inflict the knife injuries was rejected, the conclusion is inescapable, and the only inference possible on the facts, was that she intended to inflict the two fatal injuries found on the neck and abdomen of the deceased and that those two injuries were not accidental nor otherwise unintentional. The point raised is a novel one and a difficult one to resolve having regard to the circumstances of the present case. On the evidence before them the trial judges, having arrived at the findings of fact we have just outlined, apparently omitted to consider whether or not the first appellant had the intention to inflict the fatal injuries present. We are of the opinion, based purely on the trial judges' other findings of fact and their rejection of the first appellant's defence, that any reasonable jury, had there been a jury, on those proved facts, and particularly the finding that she deliberately, not accidentally, inflicted the fatal injuries with great force on vital parts of the body, would undoubtedly have gone on to draw the inference that the first appellant intended to inflict the fatal injuries found on the deceased. Indeed, the inference that she intended those injuries is irresistible. The difficulty to be resolved is whether this court, the Court of Criminal Appeal, should in the circumstances apply the proviso to section 54 of the Supreme Court of Judicature Act where the trial judges in giving their reasons for convicting the first appellant of murder under the third limb of section 300 of the Penal Code disclosed they had failed to draw the irresistible inference that the first appellant had the intention required under the third limb but where the other proved facts would undoubtedly support the conviction.

We do not consider that the many English authorities which deal with a similar proviso in England ought to guide us because of the fundamental difference that in England the system is trial by jury whereas our system is trial without a jury. In the light of our own system we are of the opinion that on the true construction of the proviso this court, if it is satisfied on the facts as found proved by the trial court and if it is also satisfied on those proved facts that other irresistible inferences of fact ought to be drawn which, if drawn, would support the verdict of guilty arrived at by the trial court, ought to give full effect to the proviso. We would accordingly apply the proviso as against the first appellant in the circumstances of the present case.

The next argument advanced depends on the interpretation of section 34. It is argued this section can only be applied if the common intention of the persons accused of an offence is to commit the offence with which they are charged. In other words it is argued that the second appellant will not be guilty of the offence under section 302 of the Penal Code unless the common intention of the appellants was to cause the death of Mrs. Watanabe, or was such other intention as is mentioned in section 300 of the Penal Code. Section 34 is in these words:

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."

There is no doubt that for this section to apply there must be in existence a common intention between all the persons who committed the criminal act, and that a criminal act be done in furtherance of that common intention. When these two requirements are proved, each of such persons would be liable for the entire criminal act in the same manner as if he had

done it alone. The Privy Council in *Mahboob Shah* v. *Emperor*[2] said this of section 34:

"Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intentions of all' nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all. If this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone".

In an earlier case, *Barendra Kumar Ghosh* v. *Emperor*[3] the Privy Council said:

"Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it:

....

In other words, 'a criminal act' means that unity of criminal behaviour, which results in something for which an individual would be punishable if it were done by himself alone, that is a criminal offence."

It is clear from the Privy Council's interpretation of the words "criminal act" that it is the result of a criminal act which is a criminal offence. It then remains, in any particular case, to find out the actual offence constituted by the "criminal act." If the nature of the offence depends on a particular intention the intention of the actual doer of the criminal act has to be considered. What this intention is will decide the offence committed by him and then section 34 applies to make the others vicariously or collectively liable for the same offence. The intention that is an ingredient of the offence constituted by the criminal act is the intention of the actual doer and must be distinguished from the common intention of the doer and his confederates. It may be identical with the common intention or it may not. Where it is not identical with the common intention, it must nevertheless be consistent with the carrying out of the common intention, otherwise the criminal act done by the actual doer would not be in furtherance of the common intention. Thus if *A* and *B* form a common intention to cause injury to *C* with a knife and *A* holds *C* while *B* stabs *C* deliberately in the region of the heart and the stab wound is sufficient in the ordinary course of nature to cause death, *B* is clearly guilty of murder. Applying section 34 it is also clear that *B*'s act in stabbing *C* is in furtherance of the common intention to cause injury to *C* with a knife because *B*'s act is clearly consistent with the carrying out of that common intention and as their "criminal act", *i.e.* that unity of criminal behaviour, resulted in the criminal offence of murder punishable under section 302, *A* is also guilty of murder.

On the facts of the present case, we are accordingly of the opinion that section 34 has been properly applied with regard to the charge against the second appellant. On his behalf it is also argued that his statement before the magistrate was wrongly admitted in evidence at the trial because an inducement had been held out by the magistrate. This argument is totally unsupported by any evidence and we reject it. It is also argued that the evidence before the trial court was insufficient to prove that he shared a common intention with the first appellant to cause bodily injury to Mrs. Watanabe with a knife. We also reject this argument as there was ample evidence to support the trial court's finding on common intention.

On behalf of the first appellant it is also contended that the trial judges erred in law in holding that the statement made by the first appellant to Inspector Tan Kim Hai was a voluntary statement and ought to have exercised their discretion in her favour by refusing to admit it in evidence. This ground is without substance as section 121(5) of the Criminal Procedure Code expressly enacts that such a statement shall be admissible in evidence at the trial. The proviso to section 121(5) gives the trial court a discretion to refuse to admit such statement —

"(a) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge against such person, proceeding from a person in authority and sufficient in the opinion of the court, to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him; or

(b) in the case of a statement made by such person after his arrest if it appears to the court that the statement was not made and recorded substantially in compliance with the provisions of the rules set out in Schedule E to this Code".

In the present case on the evidence the proviso is clearly inapplicable.

Another contention is that the trial judges erred in law in refusing to allow Dr. Wong Yip Cheong, an expert whom the first appellant desired to call to testify to her state of mind at the time when she made her statement that her statement was not voluntary. Under our criminal law the test of admissibility is not the common law test of voluntariness but is governed by section 121(5) of the Criminal Procedure Code read with the proviso we have earlier set out. Section 121(5) reads as follows: —

"Where any person is charged with an offence any statement, whether it amounts to a confession or not or is oral or in writing, made at any time, whether before or after that person is charged and whether in the course of a police investigation or not, by that person to or in the hearing of any police officer of or above the rank of inspector shall be admissible at his trial in evidence...."

A more substantial ground of appeal is that the trial judges were wrong in holding that at the time of the commission of the offence the first appellant was not suffering from any abnormality of the mind and in holding that even if she were so suffering it had not caused impairment of her brain function so as to have substantially impaired her mental responsibility for her acts in causing the death of Mrs. Watanabe.

One of the defences relied on by the first appellant was the defence of diminished responsibility. By Exception 7 of section 300 of the Penal Code —

"Culpable homicide is not murder if the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or

any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in causing the death or being a party to causing the death."

A great deal of medical evidence was tendered at the trial by both the prosecution and the defence on this issue and it is clear from their grounds of decision that the trial judges considered all the material evidence on this issue and were aware that the evidential burden which lay on the first appellant was "merely to show that the existence of circumstances bringing her case within the said exception was more probable than not".

The defence case was that at the time of the commission of the offence she was suffering from encephalitis which had reached the stage when there would be impairment of the brain function to an extent as to have substantially impaired her mental responsibility for her acts. This defence was based primarily on the evidence of Dr. Tan Bok Yang, consultant physician attached to the General Hospital and on the evidence of Dr. Wong Yip Chong, a private consultant psychiatrist. Dr. Tan first examined the first appellant on 14th January 1970 eight days after the commission of the offence and provisionally diagnosed her as suffering from meningitis which is also a viral infection of the brain primarily affecting the brain covering or meninges. Dr. Tan saw her again the next day after having advised a lumbar puncture and he diagnosed her as suffering from meningitis because of the presence of Globulin in the cerebral spinal fluid and a marked increase in the protein content of the cerebral spinal fluid. The physical symptoms found on or complained of by her were that she fainted on the way to the toilet; she had headache and giddiness; she was rather slow; she had a slight temperature of 99.6°F and had stiffness of the neck. During her stay in hospital her temperature subsided after 15th January but she complained of a poor appetite, poor memory and inability to sleep. The signs that were observed from day to day during her stay in hospital included a depressed state, an emotional instability, crying and on one particular day she threw things about. She was therefore referred to the hospital psychiatrist who found her depressed and crying and prescribed sedative and anti-depressive drugs. Another lumbar puncture was carried out on 20th January which showed Globulin still present but the protein content in the cerebral spinal fluid had decreased indicating that the patient was showing recovery. A white corpuscle count showed a total of 11,000 as against a normal average of from 5,000 to 8,000. Her blood sedimentation rate was found to be raised to 20 millimetres per hour for the first hour as against a normal of zero to seven millimetres. A skull X-ray and a urine examination showed no abnormality. Dr. Tan's opinion and diagnosis made at the time when she was in hospital was that taking the overall picture she was suffering from a viral infection of the brain of the nature of benign lymphocytic meningitis.

Subsequently, many months later on 31st October 1970, at the request of Dr. Wong Yip Chong, a private consultant psychiatrist, Dr. Tan reviewed the first appellant's medical case and closely analysed the clinical history, the symptoms and the signs and as a result of this review he told the trial court that he was —

"able to say and give an opinion now that she could have had an infection of the brain by a virus of another variety or strain other than benign lymphocytic meningitis, and most probably of the strain or variety of the Japanese 'B' encephalitis which affects primarily the brain substance or cells but may secondarily affect the brain covering or the meninges."

Dr. Tan said that —

"the differentiation between meningitis and encephalitis could sometimes be very difficult but in this particular case there were several factors which made the possibility of encephalitis likely."

According to him the factors which made the possibility of encephalitis likely were, first, the predominance of mental complaints such as crying, being emotional and throwing things about. The second factor was that her neck rigidity was very variable during her stay in hospital. The third factor was she had a poor memory and complained of lethargy and an inability to sleep which symptoms are more common in encephalitis than in meningitis. The fourth and last factor was that the report given for cells in the cerebral spinal fluid was nil which is indicative of encephalitis rather than meningitis because the cerebral spinal fluid is in more direct contact with the brain covering rather than with the brain so that if a person has meningitis which involves primarily the brain covering then the infection will produce cells in the cerebral spinal fluid.

Dr. Tan however admitted that he could not positively say she was suffering from encephalitis or a viral infection of the brain on 6th January and assuming she had a viral infection probably of the encephalitis strain on 6th January she would be very likely in the incubation or prodromal stage of her illness. He also said her actions on that day do not suggest to him that there was impairment of the function of her brain. It was common ground that in encephalitis there are three definite stages beginning with the incubation stage, then the prodromal stage and finally the frank stage but the period when one stage merges into the next is variable. It was also common ground that a person suffering from encephalitis may have that illness in a mild or moderate or severe form.

Dr. Wong Yip Chong, a private consultant psychiatrist, called as an expert witness for the first appellant said that upon the basis that she was suffering from encephalitis on 14th January and upon projection backwards he was of the opinion that she would still be suffering from encephalitis which was likely to be in a more severe form, on 6th January. On that basis he was of the opinion that in the context of the circumstances governing the alleged offence, her mind had, by reason of this illness of the brain, been abnormally affected to such a substantial degree that her mental responsibility could be reasonably considered to be significantly diminished.

Dr. Ngui a psychiatrist and the Deputy Superintendent of Woodbridge Hospital said that assuming she was suffering from encephalitis on 6th January, the stage of development of the encephalitic illness is important from the point of her mental responsibility at the time of the offence. If it was during the frank

stage that she committed the offence alleged, where symptoms of the brain disfunction in the form of confusion, disorientation, stupor, sensory and speech disturbances are present then, depending on the severity of these symptoms, she is very likely to come under the purview of either the *McNaughton* rules of insanity or of diminished responsibility. If it was during the prodromal stage again depending on the nature and severity of the prodromal symptoms she could come under the purview of diminished responsibility. If it was during the incubation stage, it is very unlikely that there would be impairment of the brain function and therefore it is very unlikely that she would come under the purview of diminished responsibility. Based on the facts presented by the prosecution Dr. Ngui's opinion was that it is improbable that she could have been suffering from the frank stage of encephalitis on 6th January and it is unlikely that she could have been suffering from the prodromal stage of encephalitis on that day and if she was suffering from encephalitis at the incubation stage, the fact that during this stage there were usually no symptoms would mean that the illness at that stage would not have adversely affected her mental responsibility at that time.

The trial judges, on the whole of the evidence, were not satisfied on the balance of probabilities, that at the time of the commission of the offence the first appellant was suffering from any abnormality of the mind. They then went on to find, even assuming she was at that time suffering from encephalitis, that they were not satisfied on a balance of probabilities that the illness had caused impairment of the brain function so as to have substantially impaired her mental responsibility for her acts in causing the death of Mrs. Watanabe.

In our judgment there was ample evidence to support the trial judges' findings. Even Dr. Tan, the consultant physician under whose care she was placed eight days after the commission of the offence, throughout the period she was under his care diagnosed her as suffering from meningitis. Although, when subsequently reviewing the case, he arrived at the opinion that she could have been suffering from encephalitis rather than meningitis, he could not say positively that she was so suffering at the time of the commission of the offence and, if she were, he was of the opinion that very likely the illness was at the incubation or prodromal stage. He also said that her actions on that day do not suggest to him that there was any impairment of the function of her brain.

For all these reasons the appeals of both appellants are dismissed.

Appeals dismissed.

Solicitors: *David Marshall; J. Tan Chor-Yong & Co.*

WAH TAT BANK LTD. & ORS. v. CHAN CHENG KUM & ORS.

[O.C.J. (Winslow J.) July 24, 1972]

[Singapore — Suit No. 1284 of 1961]

Shipping — Carriers — Bare-boat charterparty — Conversion — Wrongful delivery of goods — Liability as joint tortfeasor.

Tort — Conversion — Liability of tortfeasor — Re-trial of issue — Civil Law Act (Cap. 30, 1970 Edn.), s. (11)(a).

Practice and Procedure — Re-trial — Whether interlocutory judgment of Federal Court bars further proceedings against co-defendant under "single judgment" rule — Meaning of "sued" in Civil Law Act (Cap. 30, 1970 Edn.), s. 11(1)(a).

This was an action involving the re-trial of the issue whether the first defendant was also liable in conversion with the second defendants who had already been so found liable by the Federal Court ([1967] 2 M.L.J. 263) as confirmed by the Privy Council ([1971] 1 M.L.J. 177).

At the commencement of the re-trial, two preliminary objections were raised as follows:

(i) that the final judgment already given in this case against the second defendants by virtue of the assessment of damages in the sum of $570,500 subsequent to the Federal Court's interlocutory judgment against them was a bar to all further proceedings against the first defendant because of the single judgment rule and because "sued" in section 11(1)(a) of the Civil Law Act (Cap. 30) bears its ordinary and natural meaning and that the first defendant, who was a defendant in the same action in which a final judgment had been given against the second defendants, had been sued within such ordinary and natural meaning and that accordingly all further proceedings against the first defendant were completely barred and that the plaintiffs' claim against him must be dismissed;

(ii) that it was not open to the court on re-trial to re-open the question as to whether the second defendants were in truth liable and that as the plaintiffs had asked for and obtained judgment against the second defendants the matter was not open to the trial court for review on the ground that the Federal Court judgment was admittedly sustainable only on the basis that there was a bare-boat charterparty in existence, i.e., that the master and crew of the vessels which made wrongful delivery of the goods in question were the servants of the second defendants and not of the first defendant.

Both questions were answered in favour of the contentions put forward on behalf of the first defendant and the re-trial proceeded on the basis, that no matter what findings of fact were made at the end thereof, this claim against the first defendant would be dismissed because section 11(1)(a) of the Civil Law Act did not avail the plaintiffs. Section 11(1)(a) reads:

"(a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage".

Two issues arose in the course of the re-trial:

(i) whether, assuming, that the bare-boat charter point was still at large, on the evidence adduced at the re-trial there was in fact a bare-boat charter of the vessels owned by the first defendant to the second defendants, the shipping company which had been incorporated on 30th December, 1960 and had carried on the business of ship owners, merchants and shipping agent, which had formerly been carried on by the first defendant alone as sole proprietor;

(ii) whether the first defendant was a joint tortfeasor together with the second defendants in the wrongful delivery of the goods concerned by virtue of his having acted in concert with the second defendants in causing such wrongful delivery independently of the fact that he was the managing director of the second defendants.